MBf Unit Trust Managemant Bhd v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVISION NO R1–25–107 OF 2000

RAUS J

24 AUGUST 2003

Administrative Law — Judicial review — Certiorari — Application for — Whether decision by Industrial Court to be reviewed or quashed

Labour Law — Employment — Dismissal — Constructive dismissal — Test for constructive dismissal

The second respondent was a Senior Vice President of Research and Development Unit of the applicant with Grade SE1. Around March 1995, the applicant group of companies decided to streamline its Research and Development Unit of which the second respondent at that material time was the head, into two separate units. These units were to be headed by two senior officers of the applicant company of which the second respondent was selected to hold the position of Head of Production Development Unit. At the same time, the applicant group of companies had engaged Hay Management Consultant ('Hay') to conduct an extensive job evaluation exercise in all the companies under MBf group which includes the applicant. As the result of Hay's evaluation exercise, the second respondent's post of Product Development Unit was graded at Grade 15. Hence, to the second respondent, it was as a demotion. The second respondent protested against his demotion and vide a letter dated 6 October 1995 to the applicant he considered himself to be constructively dismissed by the applicant. The Industrial Court ('IC') found that the second respondent was right in considering himself dismissed without just cause or excuse and ordered reinstatement with backwages. This was an application by the applicant to quash the award of the IC for errors of law on the ground among others that the IC used and applied the wrong test for constructive dismissal.

Held, dismissing the application for certiorari:

(1) The learned chairman was not applying the unreasonable test. He applied the correct test, that is the contract test. The learned chairman, based on the evidence adduced by looking at the whole chain of events as part of one continuous story, found as a fact that the applicant was guilty of conduct which is a significant breach going to the root of the contract of employment (see paras 12, 18).

(2) Under s 33B of the Industrial Relations Act, decisions that are properly arrived by the IC in the exercise of its fact finding duty are sheltered from being quashed or reviewed by the superior courts (see para 21).

[**Bahasa Malaysia summary**

Responden kedua adalah Naib Presiden Kanan Unit Kajian dan Pembangunan bagi pemohon dengan Gred SE1. Sekitar bulan Mac 1995, kumpulan syarikat pemohon membuat keputusan untuk mengatur semula Unit Kajian dan Pembangunannya di mana responden kedua pada masa yang material adalah ketua kepada dua unit yang berlainan. Unit-unit ini akan diketuai oleh dua pegawai kanan pemohon yang mana responden dipilih untuk memegang jawatan Ketua Unit Pembangunan Pengeluaran. Pada masa yang sama, kumpulan syarikat pemohon telah melantik Hay Management Consultant ('Hay') untuk membuat penilaian pekerjaan untuk semua syarikat di bawah kumpulan MBf termasuk pemohon. Akibat daripada latihan penilaian Hay, jawatan responden kedua di Unit Pembangunan Pengeluaran dinilai sebagai Gred 15. Maka ia merupakan satu penurunan pangkat kepada responden kedua. Responden kedua membantah terhadap penurunan pangkatnya dan melalui surat bertarikh 6 Oktober 1995 kepada pemohon beliau menganggap dirinya dipecat secara konstruktif oleh pemohon. Mahkamah Perusahaan ('MP') membuat keputusan bahawa responden kedua adalah betul untuk menganggap dirinya dipecat tanpa tujuan atau alasan yang adil dan memerintahkan untuk responden kedua diambil kerja semula dengan tunggakan gaji. Ini adalah permohonan pemohon untuk membatalkan award MP kerana kesilapan undang-undang atas alasan antara lain bahawa MP menggunakan dan menerimapakai ujian yang salah untuk pemecatan konstruktif.

Diputuskan, menolak permohonan untuk certiorari:

(1) Pengerusi yang bijaksana tidak menggunakan ujian tidak munasabah. Beliau menggunakan ujian yang betul iaitu ujian kontrak. Pengerusi yang bijaksana, mengikut keterangan yang diberi dan dengan melihat semua kejadian sebagai satu cerita yang bersambung mendapati secara fakta bahawa pemohon adalah bersalah atas perbuatan yang membawa kepada kemungkiran yang merupakan asas kontrak pekerjaan (lihat perenggan-perenggan 12 dan 18).

(2) Menurut s 33B Akta Perhubungan Perusahaan tersebut, keputusan yang dicapai dengan betul oleh MP dalam tanggungjawabnya untuk mencari fakta adalah dilindung dari dimansuhkan atau dikajisemula oleh mahkamah yang lebih tinggi (lihat perenggan 21).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

Legislation refered to

Industrial Relations Act 1967 s 33B

Edward Saw (Ng Yook Woon, Andrew, TC Saw & Co) for the appellant.
Ramdhari JB (Lobo & Assoc) for the respondent.

Raus J:

INTRODUCTION

[1] This is an application by MBf Unit Trust Management Bhd ('the applicant') for an order to quash the Industrial Court's Award No 528 of 2000. In the said Award, the Industrial Court found En Hamzah bin Mohammad ('the second respondent') was constructively dismissed by the applicant. Accordingly, the Industrial Court made the following orders:

(i) that the second respondent be reinstated to the company within one month of the date of the award without loss of wages, allowances, bonus, seniority, service or benefits whatsoever;

(ii) that the reinstatement need not be to identical post as previously held by the second respondent but may be similar or any equivalent post;

(iii) that the second respondent would be given salary adjustment and increment that he would have earned had he not been dismissed;

(iv) that the second respondent would be paid backwages based on his adjusted salary and all bonuses and allowances from the date of dismissal till date of reinstatement; and

(v) that all backwages and other payments ordered to be paid less income tax deduction and employees provident fund contribution, if any, shall be paid to the second respondent through his solicitors Messrs Lobo & Associates.

FACTS

[2] The second respondent was appointed as the Area General Manager of the applicant with grade known as SE11 with effect from 23 February 1987. He was then promoted several times from the position of Area General Manager to Deputy Manager of consumer loan and then to the post of General Manager of System and Method and subsequently to the post of Vice President of Corporate Services. After the said promotions, he was finally promoted to the position of Senior Vice President of Research and Development unit with Grade SE1. His last drawn salary was RM9,875 per month and he was entitled to a company maintained car and other benefits received pursuant to the terms and conditions of his employment.

[3] In or around the month of March 1995, the applicant group of companies decided to streamline its Research and Development Unit of which the second respondent at that material time was the head, into two separate units, namely, Equity and Economic Research Unit and Production Development Unit. These units were to be headed by two senior officers of the applicant company of which the second respondent was selected to hold the position of head of Production Development Unit. At the same time, the applicant group of companies had engaged the professional services of Hay Management Consultant (the Hay) to conduct an extensive job evaluation exercise in all the companies under MBf group which includes the applicant herein. As the

result of Hay's evaluation exercise, the second respondent's post of Product Development Unit was graded at Grade 15. Hence, to the second respondent, the grading of his post at Grade 15 was regarded as a demotion.

[4] According to the second respondent, he protested against his demotion. He met Miss Liena Yew ('COW4') who then was the Vice President of Human Resources of the applicant, twice, precisely on 20 and 21 September 1995 to discuss the predicament of his position with the applicant's company. In the said meetings, the second respondent was offered orally to be posted to the applicant's subsidiary in Tonga or Papua New Guinea. The second respondent declined the said offer. Resulting from the two meetings, the applicant issued a letter dated 28 September 1995 reflecting the nature of discussion taken place between COW4 with the second respondent. The letter marked as exh C1 read as follows:

MBf unit Trust Management Berhad

(A subsidiary of MBf Finance Berhad)

Ref: HRD-09/95/97 PRIVATE & CONFIDENTIAL

28 September 1995

En Hamzah Mohamed

C/o MBf Unit Trust Management Berhad.

Dear En Hamzah,

We refer to our previous meetings on 20 September 1995 and 21 September 1995, wherein it was noted that:

(1) you were transferred to MBf Unit Trust Management Berhad to the position as Head of Research and Development in 1 August 1994;

(2) because the work and responsibility for Research and Development is currently organized and undertaken by a special Section headed by another Senior Executive, in the interest of business efficacy, the Management offered you employment in our MBf subsidiaries in Tonga or Papua New Guinea, but you have now expressly declined this;

(3) you have been further advised that as a result of the job evaluation exercise conducted with the advice and recommendation from Hay Management, the job you are currently performing is of Grade 15 level;

(4) you have now proposed to the management to grant you retrenchment benefits in the above circumstances.

We will now convey to the Management your request for compensation in the following manner as discussed:

1 That you be accorded a dealer's licence to trade in securities.

2 That a full Kelab Century membership be accorded to you.

3 That you be given the option to purchase the Company's car.

4 Your request of one lump sum payment of RM250,000 (nett after tax deduction) is to be given to you as compensation for loss of office.

Please confirm by 4 October 1995, that the above is a correct reflection of our discussion.

Ref: HRD-09/95-7

En Hamzah Mohamad

We would revert to you immediately on the outcome of your request and if necessary, arrange another meeting with your goodself.

Yours faithfully,

Sgd

Liena Yeow

VICE PRESIDENT

HUMAN RESOURCES.

Ly/lt2/m1/p9

[5] The second respondent had responded vide his letters dated 2 October 1995 and 3 October 1995, refuting the contents of the said letter. In the letter dated 2 October 1995, the second respondent had indicated to the applicant that he needed seven days to reply to the applicant's letter. However, the second respondent did not wait for seven days as on 3 October 1995 he had replied to the applicant's letter as follows:

Hamzah bin Mohammad

7371, Jalan Akik

Taman Setia, Gombak

53100 Selangor.

Your Ref: HRD–09/95–7

3 October 1995

Miss Liena Yeow

Vice President, Human Resources

MBf Unit Trust Management Berhad

9th Floor, Wisma MBf

113, Jalan Pudu

55100 Kuala Lumpur.

Dear Ms Liena,

I refer to your letter dated 28 September 1995 and my reply dated 2 October l995.

Your attempt to justify the serious breach of my contract of employment sounds hollow. At no time did I accept the demotion of my status to Grade 15 level neither did I propose to the management to grant me retrenchment benefits.

The proposal in your letter came from you and therefore, there is no question of me agreeing to be 'retrenched'.

However, since you have asked me to consider your proposal, I have done so on a without prejudice basis and confirm, also on without prejudice basis, my agreement to it subject to the changes as stated below and provided you confirm in writing that you will effectuate and pay me the proposed package by 7 October 1995.

(1) That I be given the option to purchase the company car WCV 2908 at book value or market value, whichever is the lower.

(2) The lump sum payment of RM250,000 as compensation for loss of office should be made not only net of tax but also net of EPF contribution. In other words, the Company is to also pay both the employer's and employee's contributions to the EPF on the amount of RM250,000 + tax.

Alternatively if you are not agreeable to the package proposed by you, I insist that I be restored to Grade 21 under the Hay Management System (which is my rightful Grade) with effect from 7 October 1995 (I require a letter on this) failing which, I will consider myself dismissed by the Company with effect from 8 October1995.

Your Sincerely,

Sgd

.....

(Hamzah bin Mohammad)

cc: Mr Chua Boon Keng

MBf Unit Trust Management Berhad

4th Floor, Plaza MBf, Jalan Ampang

Kuala Lumpur.

[6] Arising from the second respondent letters, the applicant issued another letter dated 4 October 1995 to the second respondent which read as follows:

MBf Unit Trust Management Berhad

(A subsidiary of MBf Finance Berhad)

Ref: HRD-10/95 PRIVATE & CONFIDENTIAL

WITHOUT PREJUDICE

4 October 1995

Encik Hamzah Mohamad

c/o MBf Unit Trust Management Berhad

Dear Encik Hamzah,

We refer to your letter dated 3 October 1995.

We are surprised and regret to see that you have chosen to retract the understanding reached in our two earlier meetings in view of the fact there has to be an unavoidable substantial reduction in your portfolio of responsibilities.

You will recall that the question of redundancy arose as a result of your refusal to accept transfer or job posting to similar senior positions within our Group of Companies.

In respect of your contention that you should be a Grade 21 allow us to draw your attention to para 3 of our letter dated 28 September 1995, wherein it is clearly stated that a job evaluation exercise was conducted with the advice from the Hay Management Consultants who is an independent party before determining the grading level of the job function you are currently holding. As you are also aware, this exercise was done on all executives in the entire MBf Group of Companies with the objective of enhancing our organizational effectiveness in our operations.

As such you will agree that at no time was a decision made unilaterally by the company.

In this regard, we wish to advise that the management is not prepared to consider your demand. However, the management may consider granting you severance benefits based on one month salary for each year of service. Please confirm not later than 6 October 1995 whether the above compensation decided by the management is acceptable to you as full and final settlement as your severance benefits.

Yours faithfully,

Sgd.

LIENA YEOW

Vice President

Human Resources.

[7] Upon receiving the above letter from the applicant, the second respondent considered himself had been dismissed with effect as at 6 October 1995 and in return had informed the applicant of the same vide his letter dated 6 October 1995 which read as follows:

Hamzah bin Mohammad

7371, Jalan Akik

Taman Setia

Gombak

53100 Selangor.

6 October 1995

Your Ref: HRD–10/95

Ms Liena Yeow

Vice President, Human Resources

MBf Unit Trust Management Berhad

9th Floor, Wisma MBf

113, Jalan Pudu

55100 Kuala Lumpur.

Dear Ms Liena,

I refer to your letter dated October 4th, 1995 received by me on 5 October 1995 at 10.30am.

I am surprised to note that you have *induced* so-called redundancy situation as a result of my refusal to go to Tonga or Papua New Guinea (mentioned in para 2 of your letter dated 28 September 1995).

In view of the contents of your letter, I have no alternative but to consider myself dismissed by the company with immediate effect today, 6 October 1995.

As for the company car in my possession I will be retaining the same pending the conclusion of my legal proceedings over my unfair dismissal by the company.

As regard the reimbursement of claimant expenses incurred by me, please send it to my home address which I will be receiving under protest.

Yours sincerely,

Sgd.

HAMZAH BIN MOHAMMAD

Cc: Mr. Chua Boon Keng

Chief Executive Officer

MBf Unit Trust Management Berhad

4th Floor, Plaza MBf

Jalan Ampang, Kuala Lumpur.

[8] The learned Chairman of the Industrial Court, after stating the law on constructive dismissal and after looking at the whole chain of events that led to the second respondent considering himself dismissed, found that the second respondent was right in considering himself dismissed and had been dismissed without just cause or excuse.

APPLICANT'S GROUNDS TO SET ASIDE THE AWARD

[9] Essentially the applicant challenges the award for errors of law on the following grounds:

(i) that the Industrial Court used and applied the wrong test for constructive dismissal;

(ii) that the Industrial Court failed to take into account relevant consideration and acted contrary to the evidence and/or acted on no evidence in reacting its findings;

(iii) that the award on the whole is 'unreasonable' in the *Wednesbury* sense; and

(iv) that the Industrial Court took into account irrelevant considerations and failed to take into account relevant considerations in awarding the final remedy.

FINDINGS OF THIS COURT

(i) Wrong test for constructive dismissal

[10] It is submitted by the learned counsel for the applicant that the learned Chairman of the Industrial Court has misdirected himself on the applicable law on constructive dismissal. According to the learned counsel, the learned Chairman has applied the unreasonable test instead of employing the contract test. Thus, it was submitted that the reasonableness or unreasonableness of the applicant's conduct should not be taken into account when deciding whether there is constructive dismissal. According to him, in order to uphold the conduct of the applicant to amount to a repudiation of the contract of employment to dismissal, there must be a breach of some relevant terms of the contract, express or implied and the breach must be so fundamental as to evince that an intention not to be bound by the contract. Thus, it is submitted that the learned chairman has failed to identify which of the contract express or implied, had been breached by the applicant.

[11] With respect, I am unable to agree. No doubt the learned chairman, did discuss at great length concerning the application of the unreasonable test in the cases of constructive dismissal, but he did not apply the said test. In actual fact, the learned chairman had applied the contract test. This can be clearly seen in the body of the award where the learned chairman said:

> Was the company guilty of conduct which is significant breach going to the root of the contract of employment or was the company guilty of conduct which is a significant breach which show that the company no longer intended to be bound by one or more of the essential terms of the contract.

[12] Clearly, from the above passage the learned chairman was not applying the unreasonable test. He applied the correct test, that is the contract test. In determining whether the appellant has breached the terms of the contract, the learned chairman examined the whole chain of events which according to him 'forming part of one continuous story' that led to the declaration by the second defendant that he has been constructively dismissed. The learned chairman after dealing with great length and detail over the evidence presented before him, concluded as follows:

> The claimant was downgraded to Grade 15 has never been disputed by the company due to job size. The job size is not something that the claimant had planned. It was imposed on him by the company. The claimant is said to have been downgraded

because under Grade SE-1 his minimum salary was RM7,000 while there was no limit to be maximum. For the new Grade 15, minimum was RM2,886 and the maximum was RM4,809. No doubt the claimant continued to draw his present salary but in terms of grading he was way down and he being a Senior Vice President. I agree with the submission made by the learned counsel for the claimant that by taking away part of the claimant's functions and responsibilities for whatever reason or reasons the company has breached the terms and conditions of the claimant's employment.

[13] The learned chairman further added as follows:

It is beyond any doubt that in the present case the claimant was downgraded to grade 15 be it from Grade 21 or 18 under Hay or Grade SE 1 under the old scheme. The whole conduct of the company in downgrading, offering to transfer the claimant to its subsidiaries in Tonga and Papua New Guinea and removing part of the claimant's function and responsibilities by splitting the Research and Development Unit in two the whole chain of events leading to the claimant issue a letter to the company considering himself dismissed by the company with immediate effect (CLB-9) show that the company was guilty by conduct which is significant breach going to the root of the contract of employment. The claimant was right in considering himself dismissed and dismissed without just cause or excuse.

[14] Clearly, as demonstrated above, the learned chairman was applying the contract test when he determined that the second respondent was constructively dismissed by the applicant.

(ii) Failed to take into account relevant consideration and acted contrary to the evidence

[15] It is submitted by learned counsel for the applicant that the learned Chairman failed to take into account the fact that the advised Grade 18 was the original position of head of Research and Product Development and because of the split in the Research and Product Development, the job size of the two individual unit became smaller. It was for that reason why the position of the head of the Product Development was graded at 15.

[16] With respect, it is not true this issue was not addressed by the learned chairman. The learned chairman was conscious as to the reason why the second respondent's post was downgraded to Grade 15. But according to the learned chairman, when the second respondent original Grade SE-1 is compared to the new Grade 15, the second respondent's post was downgraded. I am in agreement with the said finding. This is because under Grade SE-1 the minimum salary of the second respondent was RM7,000 while there was no limit to the maximum. But for the new Grade 15, the minimum salary was RM2,886 and the maximum was RM4,809. Clearly in terms of grading, the second respondent was way down bearing in mind he was at that time the Senior Vice President of the applicant.

[17] It is accepted that the applicant has every right to restructure its organization to advance its business objectives. But that was not the complaint of the second respondent. The complaint by the second respondent was that he was downgraded as the result of the reorganization of the applicant. The

learned chairman found that the second respondent was in fact downgraded and I have no reason to disagree

(iii) The award on the whole is unreasonable in the Wednesbury sense

[18] The learned counsel for the applicant submitted that the learned chairman had misunderstood the facts and failed to appreciate the evidence before him. According to him, had the learned chairman understood and appreciate the facts, he would not have found that the applicant had deliberately reduced the second respondents' functions and responsibilities to his determent and the applicant was trying to induce a situation to transfer the claimant to Tonga and Papua New Guinea and picking him on transfer, and that Grade 15 was a downgrading. Again, with respect I am unable to agree. Based on the evidence, there is no doubt that the second respondent's function and responsibilities was reduced and his post was graded Grade 15 as oppose to his original Grade SE-1. It is also a fact that the second respondent was offered by the applicant to be transferred to Tonga and Papua New Guinea, when the second respondent raised the issue of his post being downgraded with the applicant. The learned chairman, based on the evidence adduced by looking at the whole chain of events as part of one continuous story, found as a fact that the applicant was guilty of conduct which is a significant breach going to the root of the contract of employment. I have no reason to disagree.

(iv) Taking into account irrelevant consideration and failed to take into account relevant consideration in awarding the final remedy

[19] It is submitted in the alternative by the applicant's counsel that the remedy awarded should be quashed and remitted back to the Industrial Court for reassessment of the award. According to learned counsel that the Industrial Court has exceeded its jurisdiction in awarding backwages based on adjusted salary when there was uncontroverted evidence that salary increments were purely discretionary. He submitted that the Industrial Court erred in law when it acted on no evidence in awarding bonuses to the claimant.

[20] Again, with respect, I am unable to agree. The Industrial Court was correct in holding that the second respondent was entitled to salary adjustment and increment. To me, as to how much the second respondent is entitle to, is left to the discretion of the applicant.

Conclusion

[21] In conclusion, I am of the view that the grounds put forward by the applicant are devoid of any merit. It is trite law that by virtue of s 33B of the Act, decisions that are properly arrived by the Industrial Court in the exercise of its fact finding duty are sheltered from being quashed or reviewed by the superior courts. Furthermore, the decision that was arrived at by the Industrial Court in this case is one which any reasonable tribunal, similarly circumstanced should have reached. I, therefore, dismissed the applicant's application with costs.

[22] Applicant's application for certiorari dismissed.

Application for certiorari dismissed.

Reported by AG Kalidas